

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
SEPTEMBER 4, 2008 Session

**STEPHANIE CAPPS d/b/a STEPHANIE’S CABARET and SMITH
INVESTMENT GROUP, L.P. v. METROPOLITAN GOVERNMENT
OF NASHVILLE AND DAVIDSON COUNTY**

**Direct Appeal from the Chancery Court for Davidson County
No. 04-3211-IV Richard H. Dinkins, Chancellor**

No. M2007-01065-COA-R3-CV - Filed December 31, 2008

This appeal involves a permit issued to the Nashville Union Rescue Mission for use as a “religious institution.” An appeal was filed to the local zoning board by a neighboring landowner, who claimed that the Mission does not meet the definition of a religious institution. The local zoning board concluded that the Mission is a religious institution, and it denied the appeal. The appellant filed a petition for writ of certiorari in chancery court, and the chancery court affirmed the zoning board’s finding. We affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which HOLLY M. KIRBY, J., and J. STEVEN STAFFORD, J., joined.

Bob Lynch, Jr., Nashville, TN, for Appellant Stephanie Capps d/b/a Stephanie’s Cabaret

George A. Dean, Nashville, TN, for Appellant Smith Investment Group, L.P.

Sue B. Cain, Director of Law; J. Brooks Fox, Elizabeth A. Sanders, Assistant Metropolitan Attorneys, Nashville, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

On July 29, 2004, the Department of Codes Administration for the Metropolitan Government of Nashville and Davidson County (“the Codes Department”) issued a permit to the Nashville Union Rescue Mission (“the Mission”) for use as a “religious institution.” The permit states that its purpose is “to expand the use of Nashville Rescue Mission for religious meetings activities.” However, the permit was not obtained because of any change in the nature of the Mission. No work or construction was necessary at the Mission in order to become a religious institution, and there was no change in the Mission’s activities. The land use of “religious institution” was simply added to the permit because the Mission’s current permit only listed “transient habitation.”

Shelby Smith is the president of Smith Investment Group, L.P., which owns property directly across the street from the Mission. On August 30, 2004, Mr. Smith filed an appeal to the Metropolitan Board of Zoning Appeals (“BZA”),¹ claiming that the Mission does not operate as a “religious institution.” The BZA held a hearing on the matter on October 7, 2004. Metropolitan Code of Laws (“M.C.L.”) section 17.08.030 authorizes multiple uses for one property, and a “religious institution” is permitted as of right in the zone where the Mission is located. The term “religious institution” is defined in the zoning code as “any structure or site used primarily for religious practices.” M.C.L. § 17.04.060.

The attorney for Mr. Smith argued that the Mission does not meet the definition of a “religious institution” because it is not used primarily for religious practices. In support of his argument, he submitted records from the police department listing the number of times the police have been called to the property for various incidents and disturbances. The party who was leasing Mr. Smith’s property, Stephanie Capps, also participated in the hearing through her attorney. Ms. Capps’ attorney also argued that the Mission did not meet the definition of a religious institution.

¹ Tennessee Code Annotated section 13-7-206(b) provides, with regard to municipal zoning:

Appeals to the board of appeals may be taken by any person aggrieved . . . by any grant or refusal of a building permit or other act or decision of the building commissioner of the municipality or other administrative official based in whole or part upon the provisions of this ordinance enacted under this part and part 3 of this chapter.

Tennessee Code Annotated Section 13-7-207 further provides:

The board of appeals has the power to:

(1) Hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, permit, decision, or refusal made by the municipal building commissioner or any other administrative official in the carrying out or enforcement of any provision of any ordinance enacted pursuant to this part and part 3 of this chapter;

....

The Mission submitted various evidence in support of its contention that it is a “religious institution.” The Mission employs thirteen ordained ministers, and one of these ministers participated in the hearing. He explained that devotions are held every morning at the Mission, and chapel services are held every evening, 365 days a year. In addition, the Mission provides food, shelter, and rehabilitation programs to the public, but an individual must attend chapel service in order to spend the night at the Mission or eat meals there. The only exception to this requirement is when the temperature at night falls below 34 degrees. The Mission submitted evidence that, in 2003, there were 142,496 different individuals who attended the Mission’s evening chapel services, 2,098 people who rededicated their lives at the Mission, and 820 people who prayed to receive salvation.

The Mission submitted its charter of incorporation, recorded in the Secretary of State’s office in 1954, stating that the Mission was incorporated “for the purpose of promoting the preaching and spreading of the Gospel of Jesus Christ by public gatherings, by radio, and personal work of all kinds; . . . providing temporary shelter and food for homeless persons, and, through spiritual and material aid, helping in their rehabilitation.” The Mission’s bylaws stated the purpose of the Mission as “Glorifying Jesus Christ by providing temporary shelter and food for homeless persons, providing spiritual and material aid to people in need, helping in their recovery, and promoting the preaching, teaching and spreading of His Gospel.” The Mission’s “Mission Statement” read:

Following God’s command to love our neighbor as ourselves the Nashville Rescue Mission seeks to help the hurting of Middle Tennessee by offering food, clothing and shelter to the homeless and recovery programs to those enslaved in life degrading problems. Our goal is to help people know the saving grace of Jesus, and through Him, gain wisdom for living, find fulfillment in life and become a positive part of their community.

The Mission also introduced its application to the Internal Revenue Service for tax-exempt status as a 501(c)(3) organization, which was approved, in which the Mission described itself as “a church.” The Mission was also granted tax-exempt status by the Tennessee Department of Revenue, and the Tennessee State Board of Equalization granted the Mission a “religious” property tax exemption. Approximately forty letters were submitted from citizens who considered the Mission to be a church. In addition, approximately 120 individuals had signed a petition which stated, “I attend regularly and consider the Nashville Rescue Mission my church.” The Mission also submitted photographs of various Christian crosses displayed on all sides of its building and on its signs stating, “Nashville Rescue Mission.” Other photographs showed the chapel inside the Mission, which seats 418 people, and also showed the pulpit.

At the conclusion of the hearing, the BZA voted four to two to deny Mr. Smith’s appeal challenging the Mission’s permit.

On November 12, 2004, Smith Investment Group, LP, and Ms. Capps filed a joint petition for writ of certiorari in chancery court, seeking a review of the BZA's decision.² They alleged that the BZA's decision was "illegal, arbitrary and capricious and/or beyond the jurisdiction of the Board." The chancellor, by fiat, directed that the writ issue, requiring the Metropolitan Government of Nashville and Davidson County, acting by and through the Metropolitan Board of Zoning Appeals ("Metro"), to transmit the record to the court for review.

On April 3, 2007, the chancery court entered a "Memorandum Opinion and Order" in which it found that there was substantial and material evidence to support the BZA's decision. Ms. Capps timely filed a notice of appeal to this Court.

II. ISSUES PRESENTED

The only issue we perceive on appeal is whether the BZA's decision is supported by material evidence. We conclude that it is and affirm the decision of the chancery court.

III. STANDARD OF REVIEW

"Deciding whether a particular situation meets the requirements of a zoning ordinance is an administrative function, quasi-judicial in nature." *City of Brentwood v. Metro. Bd. of Zoning Appeals*, No. M2005-01379-COA-R3-CV, 2007 WL 1890641, at *6 (Tenn. Ct. App. June 28, 2007) *perm. app. denied* (Tenn. Oct. 15, 2007, Oct. 22, 2007) (citations omitted). In this instance, a zoning board's decision involves "applying the facts of the situation before the board to the applicable ordinance or requirement, *i.e.*, enforcing, applying, or executing a law already in existence." *Id.* Therefore, the proper method for seeking judicial review of a decision by a local board of zoning appeals is by filing a petition for a common law writ of certiorari. *Harding Acad. v. Metro. Gov't of Nashville & Davidson County*, 222 S.W.3d 359, 363 (Tenn. 2007) (citing Tenn. Code Ann. § 27-8-101 (2000); *McCallen v. City of Memphis*, 786 S.W.2d 633, 639 (Tenn. 1990)); *BMC Enters., Inc. v. City of Mt. Juliet*, No. M2007-00795-COA-R3-CV, 2008 WL 836086, at *4 (Tenn. Ct. App. Mar. 27, 2008) *perm. app. denied* (Tenn. Oct. 27, 2008); *W. Express, Inc. v. Metro. Gov't of Nashville & Davidson County*, No. M2005-00353-COA-R3-CV, 2007 WL 2089744, at *3 (Tenn. Ct. App. July 11, 2007).

The common law writ of certiorari affords quite limited judicial review. *Lafferty v. City of Winchester*, 46 S.W.3d 752, 758 (Tenn. Ct. App. 2000). "It empowers the courts to determine whether the local zoning board exceeded its jurisdiction; followed an unlawful procedure; acted illegally, arbitrarily, or fraudulently; or acted without material evidence to support its decision." *Id.* at 758-59 (citing *Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 342-43 (Tenn. 1983); *Hoover, Inc. v. Metro. Bd. of Zoning*, 955 S.W.2d 52, 54 (Tenn. Ct. App. 1997); *Hemontolor v. Wilson County Bd. of Zoning Appeals*, 883 S.W.2d 613, 616 (Tenn. Ct. App. 1994)). "In

² The parties do not address whether Ms. Capps was a proper party to the petition for writ of certiorari when she did not file the appeal to the BZA, so we will not address the issue. We simply note that Ms. Capps has participated at all levels of this proceeding.

proceedings involving a common law writ of certiorari, illegal, arbitrary, or fraudulent actions include: 1) the failure to follow the minimum standards of due process; 2) the misrepresentation or misapplication of legal standards; 3) basing a decision on ulterior motives; and 4) violating applicable constitutional standards.” *Harding Acad.*, 222 S.W.3d at 363 (citing *Hoover, Inc. v. Metro. Bd. of Zoning Appeals*, 924 S.W.2d 900, 905 (Tenn. Ct. App. 1996)). If no evidence supports the action of the zoning board, then its action is arbitrary. *Id.* However, a reviewing court “may not reweigh the evidence, examine the intrinsic correctness of the decision being reviewed, or substitute [its] judgment for that of the local officials.” *Id.* (citing *Moore v. Metro. Bd. of Zoning Appeals*, 205 S.W.3d 429, 435 (Tenn. Ct. App. 2006)). “In recognition of the policy that favors permitting the community decision-makers closest to the events to make the decision, the courts refrain from substituting their judgments for the broad discretionary power of the local governmental body.” *Lafferty*, 46 S.W.3d at 758 (citing *McCallen*, 786 S.W.2d at 641-42); *Whittemore v. Brentwood Planning Comm’n*, 835 S.W.2d 11, 15 (Tenn. Ct. App. 1992)). “The meaning of a zoning ordinance and its application to a particular circumstance are, in the first instance, questions for the local officials to decide.” *City of Brentwood*, 2007 WL 1890641, at *7 (quoting *Whittemore*, 835 S.W.2d at 16). The common law writ of certiorari is “simply not a vehicle which allows courts to consider the intrinsic correctness of the conclusions of the administrative decision maker.” *Id.* at *6.

IV. DISCUSSION

A. Does Material Evidence Support the BZA’s Decision?

On appeal, Ms. Capps maintains that the BZA’s conclusion that the Mission is a religious institution is not supported by any material evidence. The issue of whether there is sufficient evidence to support a zoning decision is a question of law, which we review de novo with no presumption of correctness. *BMC Enters., Inc.*, 2008 WL 836086, at *5; *Demonbreun v. Metro. Bd. of Zoning Appeals*, 206 S.W.3d 42, 46 (Tenn. Ct. App. 2005). “The ‘material evidence’ standard requires ‘such relevant evidence as a reasonable mind might accept as adequate to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration.’” *Demonbreun*, 206 S.W.3d at 46 (citing *Pace v. Garbage Disposal Dist.*, 390 S.W.2d 461, 463 (Tenn. Ct. App. 1965)). The BZA’s determination must be supported by more than a scintilla or glimmer of evidence; it must be of a substantial, material nature. *Id.* As stated above, however, we will not reweigh the evidence or substitute our judgment for that of the BZA. See *Harding Acad.*, 222 S.W.3d at 363.

In this case, we find that material evidence supports the BZA’s conclusion that the Mission is a religious institution, or a “structure or site used primarily for religious practices.” M.C.L. § 17.04.060. Essentially, the appellant asks us to “reweigh the evidence, examine the intrinsic correctness of the decision being reviewed, or substitute our judgment for that of the local officials,” which we cannot do. *Harding Acad.*, 222 S.W.3d at 363.

Morning devotions and evening chapel services are held at the Mission 365 days a year. The record before the BZA included photographs of the pulpit and chapel inside the Mission, which seats

over 400 people. In addition, crosses are displayed on all sides of the building. There are 13 ordained ministers on staff at the Mission. Approximately 120 individuals signed a petition which stated, "I attend regularly and consider the Nashville Rescue Mission my church." Also, the Mission's charter of incorporation, bylaws, and other documents were submitted which confirmed the religious nature of the organization. This evidence provides a reasonably sound basis for the BZA's conclusion.

V. CONCLUSION

For the aforementioned reasons, we affirm the decision of the chancery court. Costs of this appeal are taxed to the appellant, Stephanie Capps d/b/a Stephanie's Cabaret, and her surety, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.